

BEFORE THE MONTGOMERY COUNTY ETHICS COMMISSION

Waiver

The assistant director of the Department of Economic Development, Henry Bernstein, has asked the Commission to waive the ethic law's conflict of interest provisions so he can continue to act as manager of the Shady Grove Life Sciences Center. The waiver is needed because Mr. Bernstein recently learned that four of his relatives each inherited a .66675% interest in a property located in the Life Sciences Center. For the reasons below, the Commission is granting the requested waiver because it meets the criteria set out in the ethics law.

Mr. Bernstein's duties

Mr. Bernstein is the assistant director of the Department of Economic Development and manages the Shady Grove Life Sciences Center (LSC) for the County. The LSC is a 300-acre, County-developed, office park that is home to a number of biotechnology, education, and healthcare companies. The County has sold or leased all of the sites at the LSC; its remaining duties are to manage the LSC, service the tenants, and meet its long term goal of becoming the biotechnology capital of the nation.¹

Mr. Bernstein's duties with respect to the LSC are advisory and administrative; he does not have final decision-making capability on policy, program, or financial matters. Mr. Bernstein makes recommendations based on his knowledge of County policy and interests which may result in transactions taking place on the park. These transactions may be financial, legal, or architectural in nature. But final decisions approving land transactions, planning, zoning, and land use changes rest with the Department Director and the Chief Administrative Officer with respect to land leases and sales (on the Director's recommendation), and in many cases are vested in other County departments such as the Department of Permitting Services and the Maryland-National Capital Park & Planning Commission. Although Mr. Bernstein chairs the Architectural Committee that reviews architectural modifications at the park, all approvals must go through County permitting and planning agencies. Mr. Bernstein works on plans to help tenants expand, and is responsible for liaison functions between the aforementioned agencies and the County Council. Tenants in the park look to him to assist them in their efforts to do

¹ The Department's duties include: (1) construction of the Shady Grove Campus Parking Lot; (2) installation of trees to comply with Maryland-National Capital Park & Planning Commission requirements; (3) refurbishment of gateway signs; (4) working with the property owners on common area maintenance; (5) staffing the Architectural Review Committee for project expansions; (6) managing its business incubator known as the Maryland Technology Development Center; (7) working with the Commission on a density study; and (8) developing a transportation management plan.

business in the County, and he frequently speaks regarding the County's preeminence in the life sciences industry, as part of the Department's marketing program.

The Conflict

Mr. Bernstein recently learned that in February 2002 four of his relatives each inherited a .66675% interest in a property located in the Life Sciences Center. The property, Shady Grove Medical Plaza II, is a 50,000 square foot office building leased mostly to healthcare providers. The investment has a fixed ten percent annual interest rate, returning approximately \$1,200 to each relative, with an unknown final return. Mr. Bernstein reports that an investment professional knowledgeable of the property estimates the value of each share at not more than \$20,000. The interest is a class B limited partnership, where there is no control, authority or say in the management of the property. The property represents a small percentage of the total net worth of Mr. Bernstein and his wife.

Mr. Bernstein's relatives' interests in the LSC potentially conflicts with his role as the LSC manager. Section 19A-11(a)(1)(C) provides:

Unless permitted by a waiver, a public employee must not participate in any matter that affects, in a manner distinct from its effect on the public generally, any property or business in which a relative has an economic interest, if the public employee knows about the relative's interest.

To similar effect is § 19A-11(a)(2)(B), which provides:

Unless permitted by a waiver, a public employee must not participate in any matter if the public employee knows or reasonably should know that any party to the matter is any business in which a relative has an economic interest, if the public employee knows about the interest

Thus, Mr. Bernstein may not perform all of his responsibilities as a County employee without a waiver of these two provisions. We must examine the appropriate waiver standard.

The Waiver Standard

The Commission may waive the above prohibitions under § 19A-8(a) if it finds that:

- (1) the best interests of the County would be served by granting the waiver;
- (2) the importance to the County of a public employee or class of employees performing official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) granting the waiver will not give a public employee or class of employees an unfair economic advantage over other public employees or members of the public.

The Commission concludes that these standards have been met in this case. The County's best interests would be served by granting the waiver. Both the CAO and the Department Director support the waiver request. The Department Director reports that his department is relatively small and Mr. Bernstein is the only staff member focused on the complex development, planning, land use and marketing of the Shady Grove Life Sciences Center. It would be a considerable disruption to the Department, he asserts, to reassign, retrain and rebuild this technical capacity in another staff member. Mr. Bernstein states that restricting him from working on Life Sciences Center matters will be detrimental to the County because of potential missed opportunities or delays in projects that are lucrative for the County.

The importance to the County of Mr. Bernstein performing his official duties outweighs the actual or potential harm of any conflict of interest. The Commission finds that the potential harm is remote given Mr. Bernstein's lack of final decision making authority with regard to the LSC.

Finally, granting the waiver will not give Mr. Bernstein an unfair economic advantage over other public employees or members of the public. The impact of any Department decision on the value of Mr. Bernstein's relatively small interest in the LSC is likely to be minimal and speculative.

Conclusion

The requested waiver of §§ 19A-11(a)(2)(B) and 19A-11(a)(1)(C) is granted.

FOR THE COMMISSION:

[signed]

Elizabeth Kellar, Chair

A person affected by a final decision of the Commission on a complaint, request for waiver, or request for other employment may file a request for rehearing or reconsideration with the Commission within 30 days after the issuance of the Commission's final decision, as provided in § 19A-6(d). A final decision of the Commission on a complaint, request for waiver, or request for other employment may be appealed to the Circuit Court for Montgomery County within 30 days as provided in § 19A(c).